



August 23, 1999

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR99-2378

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126698.

The Texas Department of Agriculture (the "department") received a request for TDA incident numbers 2424-01-99-0012 and 2424-01-99-0003. The department has assigned this request tracking number TDA-OR-99-0059. You state that the department has released some of the responsive information. You claim, however, that the submitted documents are excepted from required public disclosure by sections 552.101, 552.103, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.¹

You contend that the Exhibit B may be withheld as attorney work product under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996).

You explain that the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapters 75 and 76 of the Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You inform us that the documents submitted as Exhibit B were gathered for and concerned an administrative action, initiated by the department, which alleged specific violations of Texas pesticide law. You explain that an administrative penalty has been assessed and the investigation is now closed. Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h); *cf* Open Records Decision No. 588 at 7 (1991) (contested cases conducted under Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103). We find that you have demonstrated in this case that the document at issue was created in anticipation of litigation. You have established the applicability of both parts of the first prong of the work product test.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You state that the document "was prepared for and at the direction of an agency attorney for the purpose of case analysis and evaluation. It was also used to summarize, for the client agency, the department's legal position regarding proof of violations of state and federal pesticide laws in an administrative, civil, or criminal hearing or trial." Having reviewed the information and your arguments, we conclude that some of the information reveals attorney mental impressions, conclusions and strategy. However, the document at issue contains other additional information that merely states the facts of a case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. *See Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). However, we believe that it is possible for an attorney's selection and organization of facts of a case to reveal the attorney's mental impression and strategy of the case. *See Marshall v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc.*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ).²

²The privilege does not apply where the party seeking to discover information shows that the information is 1) hidden in the attorney's file and 2) essential to the preparation of one's case. *Hickman v. Taylor*, 329 U.S. 495 (1947); *see Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App.--Houston [1st Dist.] 1997, no writ). While the open records context provides no opportunity for the requestor to make such a showing, we assume that in the usual case, the documents the department releases to the requestor contain the facts of the case.

With regard to the facts that appear in the submitted document, you state:

These facts were selected and ordered by the department's legal staff from existing sources, rather than directly acquired, as part of the legal analysis of the investigation. The facts are selected and ordered for the purpose of aiding the attorney in his or her evaluation of the anticipated litigation and in rendering legal advice to the client agency. Because the facts have been selected and ordered by the agency attorney for the purpose of determining and communicating the legal basis and strategy for the proposed action, such recitations are non-neutral, rather than purely factual or basically factual, summaries or communications. Disclosure of such recitations would tend to reveal the attorney's mental impressions, thought processes, and legal strategy regarding the anticipated litigation. The recitations also represent the attorney's implied or express opinion regarding the importance or necessity of specific facts in proving the alleged violation(s). Such non-neutral factual recitations cannot be disclosed without revealing the attorney's mental impressions, thought processes, opinions, and strategy.

We have reviewed the information and your arguments. Based on your statements that the attorney made the decision to include the facts in the summaries, we believe the facts would reveal the attorney's impressions and strategy. We, therefore, agree that such facts are also attorney work product excepted from disclosure under section 552.111. You may withhold Exhibit B under section 552.111.

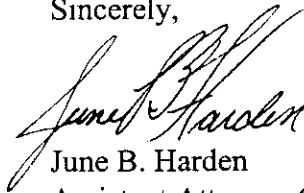
You also argue that the documents submitted as Exhibit C are excepted from disclosure under section 552.103. To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

As previously noted, the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Agriculture Code. Agric. Code § 76.007(a). Proceedings conducted after assessment of a department penalty are subject to

the Administrative Procedure Act. *Id.* at § 76.1555(h). In this instance, the department has supplied this office with information which shows that there is an ongoing investigation, and the department will, if appropriate, take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the documents in Exhibit C are related to the reasonably anticipated litigation for the purposes of section 552.103(a). Therefore, Exhibit C may be withheld pursuant to section 552.103.³

Because we are able to make a determination under sections 552.103 and 552.111, we need not address your additional arguments against disclosure. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 126698

Encl. Submitted documents

cc: Mr. George Holey
Holey Enterprises
4738 N. Highway 2008
Colorado City, Texas 79512
(w/o enclosures)

³Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).